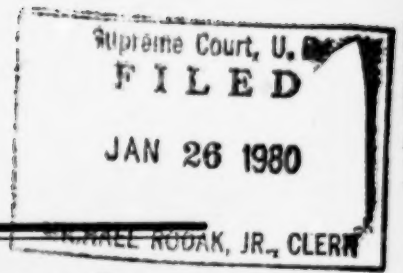


No. 79-579



In the Supreme Court of the United States

OCTOBER TERM, 1979

BERT FRANKLIN ERWIN II, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is
unreported.

JURISDICTION

The judgment of the court of appeals was entered on
July 3, 1979. A petition for rehearing was denied on
September 6, 1979. The petition for a writ of certiorari
was filed on October 9, 1979, and is therefore out of
time under Rule 22(2) of the Rules of this Court.¹ The
jurisdiction of this Court is invoked under 28 U.S.C.
1254(1).

¹On October 16, 1979, Mr. Justice Powell recalled and stayed the
court of appeals' mandate pending the disposition of the petition for
a writ of certiorari.

QUESTION PRESENTED

Whether the suspicionless boarding of an American flag vessel on the high seas by Coast Guard officers acting pursuant to statutory authority, for purposes of a safety and documentation check, violates the Fourth Amendment.

STATUTE INVOLVED

14 U.S.C. 89(a) provides:

The Coast Guard may make inquiries, examinations inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States had been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count 1), and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 2). Petitioners Chester and Brogle were each sentenced to 28 months' imprisonment and a two-year special parole term for the importation conspiracy, and were given a suspended sentence and placed on probation for three years for the possession conspiracy. Petitioner Erwin was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed (Pet. App. A).

The evidence showed that on June 3, 1978, at approximately 9:30 a.m., a Coast Guard cutter on routine patrol in the Gulf of Mexico encountered the *Adeline Marie*, an American fishing vessel, off the Louisiana coast approximately 70 miles south of the entrance to the Mississippi River (S. Tr. 7-11; Tr. 62, 67).² Acting pursuant to 14 U.S.C. 89(a), Coast Guard officers boarded the *Adeline Marie* to check its documentation and to inspect for safety and other violations (S. Tr. 11-13; Tr. 62, 75, 113-114). Once on board, the officers recognized the odor of marijuana and asked to see the ship's permanent identification number in the main hold (S. Tr. 13-14, 39; Tr. 116). When one of the Coast Guard officers opened the hold, he saw bales of marijuana partially wrapped in burlap (S. Tr. 15, 39; Tr. 117). The three petitioners, who were on board the *Adeline Marie*, were arrested (S. Tr. 27).

²S. Tr. refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript.

Relying on its en banc opinion in *United States v. Warren*, 578 F. 2d 1058 (5th Cir. 1978), the court of appeals rejected petitioners' argument that the actions of the Coast Guard officers in boarding the *Adeline Marie* pursuant to 14 U.S.C. 89(a) violated the Fourth Amendment (Pet. App. 2a). The court ruled that the boarding was within the Coast Guard's "plenary authority to board a vessel * * * without probable cause or any particularized suspicion" (*ibid.*), and that the detection of the odor of marijuana once the officers were on board provided probable cause to search the vessel (*id.* at 2a-3a).

DISCUSSION

Under 14 U.S.C. 89(a), the Coast Guard is authorized both to board and to search American flag vessels; the statute imposes no requirement of probable cause. In this case the boarding officers smelled marijuana soon after they boarded the *Adeline Marie*. Petitioners do not challenge the court of appeals' holding (Pet. App. 3a) that detection of that odor furnished probable cause for the ensuing search. See, e.g., *United States v. Arrasmith*, 557 F. 2d 1093 (5th Cir. 1977); *United States v. Solomon*, 528 F. 2d 88 (9th Cir. 1975). Accordingly, this case involves only the constitutionality of the authority granted by Section 89(a) to board American vessels at sea.

1. The Fifth Circuit, in a series of cases, has held that Coast Guard officers acting pursuant to Section 89(a) may, consistent with the Fourth Amendment, stop and board American vessels without probable cause or reasonable suspicion, for the limited purpose of conducting a safety and documentation inspection. See *United State v. Warren*, 578 F. 2d 1058, 1064-1065 (5th Cir. 1978) (en banc); *id.* at 1077 (Roney, J., dissenting); *id.* at 1079 (Fay, J., dissenting); *United States v. Odom*, 526 F.

2d 339, 342 (5th Cir. 1976); *United States v. Hillstrom*, 533 F. 2d 209, 210-211 (5th Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States v. One 43-Foot Sailing Vessel*, 538 F. 2d 694 (5th Cir. 1976), aff'g 405 F. Supp. 879 (S.D. Fla. 1975).

Although we believe that these cases were correctly decided, the constitutionality of discretionary stops under Section 89(a) has been put in question by this Court's recent decision in *Delaware v. Prouse*, 440 U.S. 648 (1979).³ *Prouse* held that a random stop of an automobile for a license and registration check, with neither probable cause nor articulable suspicion to believe that a law was being violated, was an unreasonable seizure under the Fourth Amendment.

Following *Prouse*, the Ninth Circuit, in *United States v. Piner*, 608 F. 2d 358 (1979), held that the Fourth Amendment is violated by the boarding of a vessel by Coast Guard personnel after dark for a safety and documentation inspection, absent reasonable suspicion of noncompliance. The court observed that, in light of *Prouse*, difficult questions were presented "regarding the reasonableness of random stops by the Coast Guard." *Id.* at 361. Nevertheless, the court did not attempt to resolve those difficult questions. Instead, it assumed *arguendo* that "the governmental interest in securing compliance with safety regulations outweighs the intrusion on privacy encountered in the ordinary boarding" (*ibid.*), but held that the governmental interest could be

³See *United States v. Whitmire*, 595 F. 2d 1303, 1319 n.5, 1320 n.6 (5th Cir. 1979) (Rubin, J., concurring), petition for cert. pending, No. 79-375. We note that the instant case was decided, without oral argument, some three months after the decision in *Prouse* was announced.

sufficiently protected by random daytime boardings and did not justify the increased "subjective intrusion" of suspicionless boardings of vessels after dark.

The boarding in this case took place during the daylight hours, and thus the decision below does not directly conflict with the result in *Piner*. Nonetheless, *Piner* indicates that after *Prouse* substantial doubts may be raised concerning the constitutional validity of the Coast Guard's longstanding practice of conducting routine safety and documentation checks at sea. Moreover, the issue is an important one and is likely to arise with considerable frequency in future cases. As a result of this Court's decision in *Prouse*, Coast Guard officials cannot be certain whether they may continue their historical practice of making suspicionless stops of vessels, or whether such stops must be accompanied by "articulable and reasonable suspicion" that the vessel is not in compliance with safety and documentation standards, or that either the vessel or its crew are "otherwise subject to seizure for violation of law." *Delaware v. Prouse*, *supra*, 440 U.S. at 663. For these reasons, we do not oppose review in this case.

2. While we have acknowledged that *Prouse* has raised an important question concerning the constitutionality of Section 89(a), we submit that, in the final analysis, the rule established in *Prouse* should not be applied to boardings of vessels at sea. In *Prouse* the Court reiterated that the purpose of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials * * *." 440 U.S. at 653-654 (footnote omitted). And, in assessing the reasonableness of random automobile stops without cause or suspicion, the Court gave considerable weight to the "basic, pervasive and often necessary" role of

automobile travel in American life, *id.* at 662; it also noted that other methods of spot checks, such as roadblocks, might be alternatives to the random stop of automobiles that could with equal effectiveness serve the regulatory purposes advanced to justify random stops. *Id.* at 663.

Contrary to petitioners' reasoning (Pet. 11-13), this analysis cannot be uncritically superimposed on stops at sea. As the Fifth Circuit recently noted, "[T]he principles from automobile, aircraft and boat cases do not necessarily translate literally from their discrete factual settings to the others * * *." *United States v. Whitmire*, 595 F.2d 1303, 1307 n.2 (5th Cir. 1979), petition for cert. pending, No. 79-375.⁴ And there is no practical alternative such as roadblock-type stops available to the Coast Guard. Moreover, at sea, close range observation or communication is often difficult or dangerous in the absence of a boarding.⁵ Thus, without authority for

⁴The issue in *United States v. Whitmire*, *supra*, is different from the one presented here. *Whitmire* involved the boarding of a vessel (sighted only on inland waters) by customs officers who had a reasonable suspicion of a customs violation. 595 F.2d at 1315-1316; *id.* at 1320 (Rubin, J., concurring).

⁵Furthermore, the Court in *Prouse* found it significant that, because automobiles must carry current license plates, a police officer could ascertain whether an auto was currently registered without stopping it. 440 U.S. at 660. The same is not true of boats. While, to our knowledge, all states require registration of power boats and require that such boats display registration numbers on their hulls, there is no nautical analogue to dated license plates or registration stickers and thus no way to determine, simply from observation, whether a vessel's registration is current or its documentation adequate.

In addition, although documentation of vessels might appear superficially to be analogous to state registration of motor vehicles, it stands on a significantly different footing. Under international law, no country may assert sovereignty over the high seas. "To

suspicionless boardings, the Coast Guard would be severely limited in its ability to observe or communicate with vessels at sea, an ability that is essential to the performance of its duties.

It is true that "the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). But not all governmental intrusions are of equal magnitude or demand an equal degree of protection. Rather, each such intrusion must be tested by weighing the government's interest against the significance of the privacy interests involved. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976). The federal government's interest in boarding and inspecting fishing vessels such as the *Adeline Marie* extends to such varied matters as enforcing documentation and licensing requirements, marine safety and navigation laws, and fisheries conservation and management laws.

By the same token, those on board United States flag vessels have a limited expectation of privacy. They should know that their vessel is subject to administrative inspection for the purpose of enforcing maritime laws and regulations. Moreover, the nature and extent of their

maintain order on the high seas, therefore, each nation is charged with the duty of policing its own vessels." *United States v. Warren*, *supra*, 578 F. 2d at 1065 n.4. Documentation of a vessel has the effect in international law of conferring national character upon the vessel, entitling it to the protection of the documenting state, securing for it the right of freedom of navigation and freedom from interference by other nations on the high seas, and granting it the privileges negotiated by the documenting state in port usage and other commercial treaties. 1 L. Oppenheim, *International Law* 594-597 (8th ed. Lauterpacht 1955); 1 C. Hyde, *International Law* 809-811 (2d rev. ed. 1951); M. McDougal & W. Burke, *The Public Order of the Oceans* 1011-1012 (1962).

exposure to government regulatory inspections is in significant part defined by history; comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the nation and has changed little since. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977). Consequently, persons aboard the *Adeline Marie* could have had no reasonable expectation of complete freedom from government intrusion.

On balance, the government's interest in suspicionless boardings as a means of enforcing a broad range of national goals and policies outweighs whatever expectation of privacy persons aboard American vessels could reasonably hold. Boardings are usually confined to the public or semi-public areas of a vessel, such as the weather decks (which are visible to all observers not aboard the vessel), navigation spaces such as the bridge (where vessel documents are usually found) and the hold (where the main beam number is located). Absent probable cause, boardings are not followed by searches of the more private areas of a vessel, such as berthing spaces and crew quarters. That policy was fully adhered to in this case.

CONCLUSION

While there is no conflict among the circuits on the precise issue presented by this case, and while we believe that the court of appeals' decision was correct, we do not oppose the petition for a writ of certiorari in light of the substantial importance of the issue presented and the uncertainties created by this Court's decision in *Prouse* and the Ninth Circuit's decision in *Piner*.⁶

⁶The Court may nevertheless wish to consider whether review should be declined on account of the untimeliness of the petition in this case.

Respectfully submitted.

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JANUARY 1980